

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

KELWIN DEWAYNE ADAMS

PLAINTIFF

v.

Civil No. 06-3074

DONALD KOPPENHAVER

DEFENDANT

O R D E R

Now on this 28th day of August, 2009, comes on for consideration the **Magistrate Judge's Report and Recommendation** (Doc. 63) herein and the **Plaintiffs' Objections to the Magistrate Judge's Report and Recommendation** (Doc. 64). The Court, being well and sufficiently advised, finds and orders as follows with respect thereto.

1. Plaintiff's sole remaining claim¹ in this action is his individual capacity claim against defendant Donald Koppenhavener stemming from an incident on October 27, 2006, when Koppenhavener, in responding to a disturbance in plaintiff's cell, allegedly aimed a gun at plaintiff and threatened to blow his head off if he moved. On December 2, 2008, Magistrate Judge James R. Marschewski conducted an evidentiary hearing on this claim and thereafter issued a Report and Recommendation, finding that Koppenhavener's

¹Magistrate Judge Marschewski previously issued a Report and Recommendation recommending that defendants be granted summary judgment on plaintiff's other claims. (Doc. 39.) The Court adopted this Report and Recommendation (Doc. 44) and referred plaintiff's remaining claim back to Magistrate Judge Marschewski for an evidentiary hearing and issuance of proposed findings of fact and recommendations, as authorized by 28 U.S.C. § 636(b) (1) (B).

conduct did not violate plaintiff's rights. Magistrate Judge Marschewski, therefore, recommended that judgment be entered in favor of defendant Koppenhaver and that plaintiff's complaint be dismissed.

2. Plaintiff has filed objections to the Report and Recommendation and the Court has reviewed this case *de novo*. Plaintiff objects to Magistrate Judge Marschewski's finding that plaintiff failed to prove by a preponderance of the evidence that Koppenhaver threatened to blow plaintiff's head off. Plaintiff's objection in this regard does not alter the outcome of this case.

As Magistrate Judge Marschewski went on to observe, even if Koppenhaver did point his gun at plaintiff and threaten to blow his head off, there is no evidence that plaintiff was in fear for his life and there were security concerns justifying Koppenhaver carrying the weapon into the cell - there was a disturbance in the cell, the security camera had been covered, and certain inmates in the cell had threatened to lure jailers back to the cell to "jump" them. Further, plaintiff's own testimony establishes that Koppenhaver made the alleged threat just before he put his gun down so that he could put shackles on another inmate. Thus, while the Court certainly does not condone Koppenhaver's alleged conduct, it appears that Koppenhaver was simply using a heavy hand in attempting to secure the inmates and was not acting "'maliciously and sadistically for the very purpose of causing harm,'" as is required for such conduct to be actionable. Irving v. Dormire, 519

F.3d 441, 446 (8th Cir. 2008) (internal citations omitted); Burton v. Livingston, 791 F.2d 97, 100-01 (8th Cir. 1986).

3. The Court has reviewed plaintiff's remaining objections and finds that they likewise offer neither law nor fact requiring departure from the Report and Recommendation, and the same should be, and it hereby is, adopted *in toto*.

IT IS THEREFORE ORDERED:

* The **Report And Recommendation of the Magistrate Judge** is **adopted in toto** and the plaintiff's complaint is **DISMISSED** with prejudice.

* Plaintiff has filed a **Motion for Extension of Time (Doc. 65)** requesting an extension for the filing of a notice of appeal. An extension is unnecessary, as plaintiff has 30 days from the entry of this order in which to file a notice of appeal. See Fed. R. App. P. 4(a). Accordingly, this motion is **DENIED**.

IT IS SO ORDERED.

/s/Jimm Larry Hendren
HON. JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE